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LOKMAN NOOR ADAM v. PP

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
MOHAMAD ZABIDIN MOHD DIAH JCA
AHMAD NASFY YASIN JCA
B [CRIMINAL APPEAL NO: W-05-19-01-2020]
20 JULY 2020

CIVIL PROCEDURE: *Committal proceedings – Appeal against – Whether leave for committal proceeding wrongly given – Whether there were procedural and substantive flaws – Rules of Court 2012, O. 52 r. 2B – Interpretation of*

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The appellant gave an interview with the media and had made certain statements. The Attorney General took umbrage to those statements. According to the Attorney General, the statements were calculated to bring disrepute to the administration of justice. Hence, they were contemptuous and must accordingly attract sanction. An application for leave to commence committal proceeding against the appellant ensued in the High Court. It was made *ex parte* following the procedural law as dictated by O. 52 of the Rules of Court 2012 ('ROC'). Leave was granted. The appellant was later served with the relevant papers. Obviously unhappy with this turn of events, the appellant took the view that leave for committal proceeding was wrongly given. He then applied to set aside the order giving leave on the basis of procedural and substantive flaws. The matter went before the High Court. The High Court Judge, upon considering the oral and written submissions, dismissed the application to set aside leave. Dissatisfied, the appellant appealed. The appellant sought to argue, *inter alia,* that O. 52 r. 2B of the ROC mandates a pre-condition in a form of a notice of show cause to be issued prior to an application for leave. According to the appellant, that notice must be issued by court upon leave being given and that a draft show cause notice must be annexed in the application for leave and the court must then take action by issuing the said show cause notice upon being satisfied by its contents. In an express disapproval of the course adopted by the respondent, the appellant further argued that any notice issued by an inappropriate party and that issued before the leave proceeding would not be sufficient compliance with the mandatory requirement of O. 52 r. 2B of the ROC.

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Held (dismissing appeal)
Per Ahmad Nasfy Yasin JCA delivering the judgment of the court:

(1) Order 52 r. 2B, the interpretation that commanded itself to this court is that of a literal one, especially where the words of the rules are plain and unambiguous. Using this approach one can clearly see that, what the r. 2B requires, is a notice before action. If the Rules Committee had intended otherwise *ie,* for the court to issue such notice after leave was given, such would be plainly stated in the Rules. (para 28)

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(2) It is pertinent to note that r. 2B was placed, in the order of rules before the r. 3, which deals with the next step in proceeding in the process of obtaining leave. Thus, the High Court was correct to reach the conclusion that r. 2B pertains to the step by step process in securing leave. In this respect, this court was aware that r. 2B was inserted into the Rules by way of an amendment to the Rules of the High Court 1980 and came to be continued in the combined rules in the form of the Rules of Court 2012. That amendment did not have the effect of altering the entrenched position except in so far as the requirement of show cause notice to be issued prior to leave. (para 28)

(3) The effect of the amendment is to emphasise the requirement that prior to leave, notice must be given to the proposed contemnor an opportunity to show cause and that service of the notice must be effected personally. Whilst the way in which this amendment was inserted, in that it was placed before the provision relating to service or after leave was obtained, giving the impression that the provision must therefore be read as suggested by the appellant, this court was not persuaded by this simplistic argument. That interpretation would produce illogical results. (para 28)

(4) The process of proper interpretation should not be lost or clouded by the placement of the said rule. It left no doubt that the placing of r. 2B in the entire scheme of O. 52 was an unhappily made one but the interpretation placed upon it by the High Court Judge was the correct one. This court also could not agree with that which was urged by the appellant that the notice must be issued by the court for that would lead to a creation of an obligation not anticipated by the rules. The approach suggested in *Tan Boon Thien* that a time period be specified in the notice appeared to underscore the opportunity to be given to the proposed contemnor to consider the contents of the notice carefully and to respond appropriately to the notice. (paras 28 & 29)

Case(s) referred to:

All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***
Badan Peguam Malaysia v. Kerajaan Malaysia [2008] 1 CLJ 521 FC ***(refd)***
Becker v. Neol [1971] 1 WLR 803 ***(refd)***
Dhooharika v. The Director of Public Prosecutions [2015] AC 875 ***(refd)***
Morris & Ors v. Crown Office [1970] 2 QB 114 ***(refd)***
R v. Almon (1765) 97 ER 94 ***(refd)***
Tan Boon Thien & Anor v. Tan Poh Lee & Ors [2020] 3 CLJ 28 CA ***(refd)***
Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***
Wee Choo Keong; Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor And Other Appeals [1995] 4 CLJ 427 SC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 13
Federal Constitution, arts. 10, 126
Rules of Court 2012, O. 1A, O. 2, O. 52 rr. 2B, 3(2)

Other source(s) referred to:
Professor Hay, *Contempt by Scandalizing the Court: A political history of the first hundred years,* (1987) 25 Osgoode Hall Law Journal, p. 431

For the appellant - Muhammad Shafee Abdullah, Wan Aizuddin Wan Mohammed & Sarah Abishegam; M/s Shafee & Co
For the respondent - Mohd Dusuki Mokhtar, Asmah Musa & Nurul Farhan Khalid; DPPs

[Editor's note: For the High Court judgment, please see The Attorney General v. Lokman Noor Adam [2020] 3 CLJ 429 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmad Nasfy Yasin JCA:

Introduction

[1] The appeal raises a short but no less important point of procedure. It has to do with the law of contempt, more particularly that relating to the administration of justice generally. It began, in short, as follows.

[2] The appellant gave an interview with the media. He made certain statements. Given the issues that have been raised at the High Court and before us, which will be dealt with below, it is unnecessary at this juncture to refer to the specific statements that he was alleged to have made. For that, we must wait for the substantive contempt proceeding. Suffice at this moment to say that the Attorney General took umbrage to that statements. The statements according to the Attorney General were calculated to bring disrepute to the administration of justice. Hence, they are contemptuous and must accordingly attract sanction.

Contempt And Committal Proceeding

[3] Let us pause here to state that the law of contempt is not of recent origin. It is regarded "as *sui generis* has from time immemorial reposed in the judge for the protection of the public" per Salmon LJ in *Morris & Ors v. Crown Office* [1970] 2 QB 114. As regards to that which relates to the administration of justice, the origin of the power to punish for contempt can be traced (or as Lord Clarke had said in the advice of the Privy Council in an appeal for the Mauritius Supreme Court in *Dhooharika v. The Director of Public Prosecutions* [2015] AC 875 to have been invented by) in the draft judgment of Wilmot J, in the opinion, which was prepared but undelivered because the prosecution was dropped, the case of *R v. Almon* (1765) 97 ER 94 where the following passage appear:

> The power, which the Courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine arid imprison for a contempt to the Court, acted in the face of it … And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of Court, stands upon the same immemorial usage as supports the whole fabric of the common law; … I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to he discovered about it, and therefore cannot be said to invade the common law, but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society.

[4] Although that decision was criticised by many, as being some sort of heresy, captured in that illuminating article by Professor Hay, *Contempt by Scandalizing the Court: a political history of the first hundred years* (1987) 25 Osgoode Hall Law Journal 431 referred to in *Dhooharika*, *supra*, that form of contempt has been part of the common law.

[5] Fast forward and post-independence the power to punish for contempt is to be found in art. 126 of the Federal Constitution which reads:

> **Power to punish for contempt**
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> 126. The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

[6] Section 13 of the Courts of Judicature Act 1964 also repeats the same when it enacts that:

> Contempt 13. The Federal Court, the Court of Appeal and the High Court shall have power to punish any contempt of itself.

[7] It is to be noted that the framers of the Constitution had anticipated that that the concept of contempt may somewhat be connected with the right to free speech. Article 10 of the Federal Constitution provides that Parliament may limit the right of free speech or freedom of speech by enacting law dealing with contempt. This is how the provisions read:

> (2) Parliament may by law impose
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> (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence.

[8] Of course it bears stating that no law relating to contempt has to-date been enacted by Parliament. It is worth noting too that the scope and parameters of the law of contempt is constantly evolving and it is difficult to define, a fact acknowledged by many – see for example Law Commission (UK), Consultation Paper No. 209, A Contempt of Court, Law Commission (New Zealand), Reforming the Law of Contempt of Court: A Modern Statute, Report No. 140 (2017) and Victorian Law Reform Commission, Contempt of Court, Consultation Paper (2019), to name a few. There are also development elsewhere where there is a specific legislation dealing with contempt such as in India – The Contempt of Courts Act 1971 and Singapore – Administration of Justice (Protection) Act 2016.

[9] In the absence of the substantive legislation, the position as regards to contempt can be found in the body of case law at home and at common law. It might well be that the situation is much like an unruly horse; difficult to mount and far more difficult to ride – the position remains that it is contemptuous to scandalise the courts or to conduct oneself in a manner that has the effect of putting the administration of justice to disrepute. It is to be noted that in *Dhooharika*, *supra* it was sought to argue that that offence of contempt by scandalising the court or the administration of justice no longer exist at common law by framing the following question:

> (1) Scandalising the court – does the offence still exist in Mauritius?

[10] The Board then having considered the relevant arguments came to the following conclusion:

> 4.1 In conclusion, although the Board would not now distinguish between small islands and larger territories merely on the grounds of size, it recognises that local conditions are relevant to the continued existence of the offence. It concludes that it would be inappropriate to depart from the decision in *Ahnee* and that, if the offence is to be abolished in Mauritius, it should be abolished by statute. It accordingly answers question (1) in the affirmative.

[11] We should venture to say that the same holds in Malaysia. Until a specific legislation is enacted to abolish the position obtainable at common law, the offence is still part of the Malaysian law.

The Proceeding At The High Court

[12] To return to the narrative, an application for leave to commence committal proceeding against the appellant here, ensued in the High Court. It was made *ex parte* following the procedural law as dictated by O. 52 of the Rules of Court 2012. Leave was given.

[13] The appellant was later served with the relevant papers. He was obviously unhappy with this turn of events. He took the view that leave for committal proceeding was wrongly given. He then applied to set aside the order giving leave on the basis of procedural and substantive flaws.

[14] The matter went before Collin Lawrence Sequerah J, who, upon considering the oral and written submissions dismissed the application to set aside the leave. We must state here the procedure to set aside is quite appropriate and in accord with the principles where orders obtained without hearing the other side is always opened to be set aside – *Becker v. Neol* [1971] 1 WLR 803. As regards to committal proceeding if authority is needed, one may refer to the recent Federal Court decision in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849; [2012] 3 MLJ 458.

[15] Dissatisfied with the decision of the learned High Court Judge the appellant appealed. That is how the matter came before us.

[16] We heard lengthy submissions on 13 May 2020 and took the view that there are no merits in the appeal and that there are no appealable errors. We then dismissed the same. Learned counsel for the appellant very quickly indicated that he is taking up the matter further. We then indicated that our grounds will follow. This then is our grounds.

The Submissions

[17] In the High Court, the setting aside application was anchored on at least four main grounds, but during oral submissions, two were forcefully argued. First, it was argued that the intitulement in the cause papers were defective in that the empowering provision of the Courts of Judicature Act 1964 was neither cited nor referred to. Secondly, it was contended that the notice to show cause was defective too in that it was issued by Bahagian Perundangan dan Pendakwaan, Ibu Pejabat Suruhanjaya Pencegahan Rasuah Malaysia ("MACC"). Thirdly, it was submitted that the proceeding was initiated by the wrong party. It was submitted further that since the subject matter of the purported contempt relates to Criminal Trial No. WA-45-7-11-2018 & WA-45-8-11-2018, *PP v. Mohd Najib Hj Abd Razak*, which the Public Prosecutor is in charge of, the contempt proceeding should have been initiated by the Public Prosecutor and not the Attorney General. Finally, it was canvassed that the statement under O. 52 r. 3(2) was defective because of the following:

(i) It failed to adequately particularise details and material facts; and

(ii) It failed to disclose facts likely to be disputed and reasons why such dispute is not sustainable.

[18] It was further submitted that these omissions cannot be supplemented by way of affidavit evidence and in so far as any attempt to rectify these omissions, such effort must come to naught as the omissions are incapable of being rectified by any subsequent action by way of an affidavit.

[19] In a well-reasoned judgment, the learned High Court Judge rejected each of the arguments canvassed by the appellant as summarised above. It is unnecessary for us to hearken to each and every ground of the learned judge in arriving at the decision.

Submissions In The Court Of Appeal

[20] Before us, learned counsel for the appellant sought to assail the decision of the learned High Court Judge on a number of grounds. As we have stated, the arguments were rather lengthy. We were taken to what looked like a rather tedious discourse on procedural law and effect on liberty of a subject. But when the dust is settled, what we see is the rehash of the arguments raised in the High Court.

[21] We would like to mention that a lot of time was devoted to seek to persuade us on the proper and correct interpretation that should be placed to O. 52 r. 2B of the Rules of Court 2012. For convenience, it reads thus:

> **Other cases of contempt (O. 52, r. 2B) 2B**
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> In all other cases of contempt of Court, a formal notice to show cause why he should not be committed to the prison or fined shall be served personally.

[22] This is the crux of the submission from the gamut of arguments raised by learned counsel for the appellant. We believe that we would not cause any injustice to learned counsel by summarising his arguments. All in all, it seems to us what learned counsel sought to argue is that O. 52 r. 2B as quoted above mandates a pre-condition in a form of a notice of show cause to be issued prior to an application for leave. That notice, according to learned counsel for the appellant must be issued by court upon leave being given. Learned counsel went on further to argue that a draft show cause notice must be annexed in the application for leave and then the court must take action by issuing the said show cause notice upon being satisfied by its contents. In an express disapproval of the course adopted by the respondent in this case, learned counsel further argued that any notice issued by an inappropriate party and that issued before the leave proceeding will not be sufficient compliance with the mandatory requirement of O. 52 r. 2B. In short, he castigated the respondent's interpretation of r. 2B as merely imposing an obligation of issuing what is termed as notice before action and action herein means the *ex parte* application for leave. The respondent on the other hand canvassed before us that what r. 2B requires is that a putative applicant for leave to commence committal proceeding issue a demand that the putative respondent to show cause why a potential committal proceeding should not be commenced against him. We have used the words "putative" and "potential committal proceeding" advisedly to underscore the point that the demand or "show cause", following this argument exists prior to an

application for leave itself. It was further contended that the rationale for this is to afford the opportunity to the putative respondent to consider the demand and to avoid the consequences of the contempt proceeding. Only when the putative respondent refused to show cause or that if the respondent failed to sufficiently show cause then the putative applicant may apply for leave and at that stage upon filing of the application for leave, the putative applicant is thereby converted to being an applicant and the court may then proceed with the application *ex parte*. As the necessary consequence too, only an application for leave which is bereft of the "show cause notice" would suffer the fatal flaw of being non-compliant with O. 52 r. 2B of the Rules of Court 2012.

[23] In the present case, it is not disputed that there was notice to show cause. As stated above, it was issued by Bahagian Perundangan dan Pendakwaan, Ibu Pejabat Suruhanjaya Pencegahan Rasuah Malaysia ("MACC") and it was issued prior to leave being obtained. It is also not in dispute that no show cause notice, in the sense urged by learned counsel for the appellant, by the High Court. Thus, according to learned counsel for the appellant, the leave application should not have been given and must be set aside *ex debito*.

[24] Learned counsel relied heavily on the decision of another division of this court in *Tan Boon Thien & Anor v. Tan Poh Lee & Ors* [2020] 3 CLJ 28.

[25] There, one of the issues before the court was whether the service of notice to show cause under O. 52 r. 2B of the ROC 2012 on the proposed contemnor was mandatory before any *ex parte* application for leave under O. 52 r. 3 could be properly made. Has Zanah Mehat JCA delivering the judgment of the court answered the question in the affirmative. In short, it was held that:

(i) A notice to show cause must be given before an application for leave could be made.

(ii) Further notice must specify the period within which an answer should be given by the proposed contemnor.

(iii) The application for leave can only be made after the expiry of that period.

(iv) Failure to comply with r. 2B will be fatal and not curable under O. 1A or O. 2 of RC 2012.

[26] This decision was arrived at based on the following reasons:

(i) That the word "shall" appearing in r. 2B must be given effect. It denotes a mandatory requirement;

(ii) That r. 2B was enacted for the purpose "that the proposed contemnor be given the first opportunity of answering to the notice to show cause before any application for leave is made".[1]

(iii) The "contempt proceedings being criminal in nature involving the liberty of the proposed contemnor (see the Federal Court decision in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849; [2012] 2 AMR 429), any ambiguity and uncertainty must be resolved in favour of the alleged contemnor (see the Supreme Court decision in *Wee Choo Keong; Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor And Other Appeals* [1995] 4 CLJ 427). Thus, r. 2B should be read in favour of the proposed contemnor."[2]

[27] We regret that we are unable to agree with the submissions by the learned counsel for the appellant. In our judgment, the reasoning by that division of this court does not have the effect as argued by learned counsel.

[28] In our considered judgment, O. 52 r. 2B, the interpretation that commands itself to us is that of a literal one especially where the words of the rules are plain and unambiguous – *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195; [2006] 6 MLJ 97; *Badan Peguam Malaysia v. Kerajaan Malaysia* [2008] 1 CLJ 521; [2008] 2 MLJ 285. Using this approach, one can clearly see that, and in this respect we agree with the forceful submission of learned counsel for the respondent that what the r. 2B requires is a notice before action. If the Rules Committee had intended otherwise, ie, for the court to issue such notice after leave was given, such would be plainly stated in the Rules. It is pertinent to note that r. 2B was placed, in the order of rules before the r. 3 which deals with the next step in proceeding in the process of obtaining leave. Thus the High Court was correct to reach the conclusion that r. 2B pertains to the step by step process in securing leave. In this respect, we are aware that r. 2B was inserted into the Rules by way of an amendment to the Rules of High Court 1980 on 21 September 2000 *vide* PU(A) 342/2000 and came to be continued in the combined rules in the form of Rules of Court 2012. We do not for a moment think that amendment had the effect of altering the entrenched position except in so far as the requirement of show cause notice to be issued prior to leave. To our mind, the effect of the amendment is to emphasise the requirement that prior to leave, notice must be given to the proposed contemnor an opportunity to show cause and that service of the notice must be effected personally. Whilst the way in which this amendment was inserted, in that it is placed before the provision relating to service or after leave is obtained, gives the impression that the provision must therefore be read as suggested by the appellant, we are not persuaded by this simplistic argument. As we have stated above, that interpretation would produce

illogical result. We would say that the process of proper interpretation should not be lost or clouded by the placement of the said rule. It leaves no doubt that the placing of the r. 2B in the entire scheme of O. 52 is an unhappily made but the interpretation placed upon it by the learned High Court Judge is the correct which we agree.

[29] We also cannot agree with that which was urged upon us by the appellant that the notice must be issued by court for that would lead to a creation of an obligation not anticipated by the rules. The approach suggested in *Tan Boon Thien* that a time period be specified in the notice appears to underscore the opportunity to be given to the proposed contemnor to consider the contents of the notice carefully and to respond appropriately to the notice.

[30] Based on the grounds stated above, we find that the learned High Court Judge had correctly dismissed the application to set aside the order granting leave. Therefore, we unanimously dismissed this appeal.

Endnotes:

1. See para. 34 of the grounds of judgment.
2. See para 34 of the grounds of judgment.